No. 102.

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SUPREME COURT

Brief of Cotter for D.C.

OF THE

UNITED STATES.

Filed Nov. 17, 1902.

OCTOBER TERM, 1902.

NO. 102.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE,

Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, FOR THE DISTRICT OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Defendants in Error.

BYRON S. ADAMS CO., PRINTERS, WASHINGTON, D. C.

The Supreme Court of the United States.

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THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE,

Defendants in Error.

ON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR.

ON MOTIONS TO DISMISS AND AFFIRM AND ON MERITS OF THE WRIT.

I.

ON MOTION TO DISMISS.

In support of the motion to dismiss the writ of error herein the defendants in error respectfully submit that a writ of error to the Circuit Court

can only issue to review a final judgment, and that there is no final judgment that has ever been entered in this case and none appears in the record. A writ of error has been sued out and in attempt to review the following order appearing on page 17 of the record:

"(TITLE OF COURT AND CAUSE.)

"IN OPEN COURT.

"This cause heretofore submitted to the Court on demurrer herein came on regularly for decision and thereupon it is ordered that the demurrer herein be, and the same hereby is sustained and the cause dismissed for want of jurisdiction herein."

The motion to dismiss is: First, the order is not a judgment and not reviewable, second, the record does not contain a judgment; third, there is no federal question involved.

The first two grounds of the motion to dismiss may be considered together. It is submitted that before any writ of error could be sued out and before this Court could entertain the same it was necessary that a judgment should be included in the record. The order is not the judgment, but merely the ruling of the Court, made in open court, and forming the basis for a judgment which might have thereafter been entered.

A judgment must be properly entered of record to support a writ of error.

Herrick vs. Cutcheon, 55 Fed. 6.

A record entry on a verdict as follows: "Whereupon the Court ordered judgment to be entered accordingly," was held insufficient.

Dale vs. Copple, 53 Mo. 321.

Where the judgment is required to be signed by the judge it cannot be reviewed by writ of error until it has been so signed.

Life Insurance Co. vs. Wilson, 8 Peters, 291.

An order sustaining a demurrer is not a final judgment.

Miners' Bank vs. United States, 5 How. 213.

We submit that the order appearing in the record is not a judgment.

Black on Judgments, Sec. 115, p. 125, N. 46;

Roberts vs. State, 3 Texas App. 47;

Faulk vs. Kellums, 54 Ill. 188.

Under former statutes allowing appeals within five years, an appeal might be perfected after the decision of the Court or the rendering of the decree.

Silsby vs. Foote, 20 How. 290.

But the statute has been changed and now the time begins to run from the actual entry of the decree or judgment.

Marks vs. N. P. R. Co., 76 Fed. 941;

Polleys vs. Improvement Co., 113 U. S. 81;

Winters vs. Ethell, 132 U. S. 207, at 210;

Yznaga Del Valle vs. Harrison, 93 U. S. 233;

Radford vs. Folsom, 131 U. S. 392.

Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the latter term and is under the control of the Court during said term.

Judson vs. Gage, 98 Fed. 540.

The difference between the decision of the Court or the rendering of the judgment and its entry, in so far as it affects the right to have it reviewed, is clearly established by the following cases, which hold that there can be no appeal until the judgment has been actually entered, and that an appeal taken before the actual entry of the judgment will be dismissed.

Onderdonk vs. San Francisco, 75 Cal. 534;

Coon vs. Grand Lodge, 76 Cal. 354.

The *third* ground of the motion to dismiss, because no federal question is involved or shown by the record, is well supported.

This is an action for trespass on a mining claim. The plaintiff alleges that it was at the time of the commencement of the suit and at all the times mentioned in the complaint, the owner of that portion of the Pennsylvania lode claim described in the

complaint; that the defendants entered into it and took away and converted to their own use certain ores of the value alleged, to the damage of the plaintiff in said amount, which were not paid to it. There is no allegation that it was in the *possession* or entitled to the possession of said portion of said claim. The want of allegation of *possession* in the plaintiff and the facts stated charging the defendants with taking ore show that the defendants were in possession.

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

U. S. Mining Co. vs. Lawson et al., 115 Fed. 1005.

Now whether the complaint, by reason of the absence of an allegation of possession, or right to possession, fails to give the Court jurisdiction, it is clear that in order for the plaintiff to state its cause of action it would only have been necessary for it to have alleged: First, its ownership; second, its possession; third, the entry and trespass of the defendants, and fourth, the injury sustained by the plaintiff thereby. This would have constituted, under the rules of good pleading, a statement of a cause of action in its favor. The allegations in the complaint seeking to show that the determination of a controversy would involve a federal question or the construction of some law of the United States are entirely irrelevant and imma-

terial they were and are, unnecessary to a statement of the plaintiff's cause of action; being so, they form no part of the complaint and do not enter into the cause of action whatever. To this complaint the defendants interposed a demurrer. (Record, p. 16.) The demurrer presents two points:

First, that the Court had no jurisdiction, and second, that the complaint did not state facts sufficient to constitute a cause of action.

The complaint is an amended one and was filed after the United States Circuit Court of Appeals had passed upon a like complaint in an equity action.

M. O. P. Co. vs. B. & M. Co. 85 Fed. 867.

It is evident that the defendants could have been in the possession of the premises described by the plaintiff, as its lessee or licensee, or under a claim of title thereto adverse to the plaintiff, and related back to the government title under which it may be surmised, although it is not alleged, and that the defendants were claiming a superior right to it over the plaintiff. It does not appear from the allegations setting forth plaintiff's alleged cause of action that the defendants were not in possession and claiming to own the premises described by plaintiff under and by virtue of a patent from the United States government therefor. No question of federal jurisdiction is, therefore, involved in

plaintiff's cause of action or presented in the statement thereon as contained in the complaint. The averments contained in the complaint and following the attempted statement of a cause of action by the plaintiff, are of no consequence and cannot be considered on the question of determining whether or not a federal question is involved or may become necessary for determination.

The complaint in its statement of a cause of action must disclose a federal question. The fact that a question might arise in the determination of the action, which would involve the construction of the constitution or some law of the United States is not sufficient.

For a further discussion of this matter and a reference to the authorities, we beg leave of the Court to permit us to follow the example of plaintiff in error and to submit the same upon the brief filed herein in Cause No. 103.

II.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

What we have already said with reference to the plaintiff's complaint and the position of the case before the Circuit Court as presented thereon, and

on the defendants' demurrer, and in support of the second ground of the motion to dismiss, need not be repeated here; it has direct application to the motion to affirm and to a determination of the merits of the writ of error, if the Court shall not sustain the motion to dismiss on the ground that there is no final judgment in the record, and none shown to have been entered in the action from which a writ of error could be prosecuted.

We again beg to submit the case upon the argument and authorities presented in the brief filed in Cause No. 103. For the reasons here and there stated and upon the authorities cited we respectfully submit the case for a judgment of affirmance.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Defendants in Error.